No. 10-885

In the Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule *Feres* v. *United States*, 340 U.S. 135 (1950), and reject its interpretation of the Federal Torts Claims Act, 28 U.S.C. 1346(b), 2671-2680 *et seq.*, which has been in place for more than 60 years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 379 Fed. Appx. 559. The opinion of the district court (Pet. App. 3a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on August 11, 2010 (Pet. App. 10a). On November 4, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 7, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At all times relevant to this case, petitioner's decedent, Staff Sergeant (SSgt.) Dean Witt, was on active duty with the Air Force. Pursuant to military orders, SSgt. Witt left his assignment at Hill Air Force Base (AFB) on or about August 5, 2003, and was on temporary duty (TDY en route), performing military functions, from August 6, 2003, until October 1, 2003. See No. 2:08-cv-02024, Docket entry No. 12-1, Exh. A (E.D. Cal. Dec. 28, 2008). His orders required him to report to his new commander at Travis AFB no later than October 30, 2003. See *ibid.* On October 10, 2003, SSgt. Witt was in the process of moving his family to California pursuant to those orders. See *id.* No. 12-1, ¶ 2.

On October 10, 2003, SSgt. Witt was admitted to the David Grant Medical Center at Travis AFB for acute appendicitis. Petitioner alleges that as a result of negligent post-operative care occurring on the same date, SSgt. Witt suffered a lack of oxygen that caused severe damage to his brain and led to his death on January 9, 2004. SSgt. Witt was on active duty when the alleged malpractice occurred. On October 11, 2003, he was placed on the Temporary Disability Retirement List (TDRL). He remained on TDRL until his death. Pet. App. 3a-4a; No. 2:08-cv-02024, Docket entry No. 8-2, at 2 (E.D. Cal. Nov. 3, 2008).

After the Air Force denied her administrative claim (Pet. 8a-9a), petitioner filed this action on behalf of SSgt. Witt's estate under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680 *et seq.* See Pet. App. 1a, 4a. The United States moved to dismiss the complaint pursuant to *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the FTCA does not authorize suits by or on behalf of service members that result from

service-related activity. See Pet. App. 4a. The district court granted the motion to dismiss. *Id.* at 3a-7a. The court explained that, where as here, a service member "received treatment in a military hospital by virtue of the fact that he was a service member," *id.* at 5a n.2, "injury due to medical malpractice * * * is 'incident to service.'" *Id.* at 4a. Plaintiff appealed, and the court of appeals affirmed in an unpublished, non-precedential, memorandum opinion that reiterated the district court's rationale for dismissing the complaint. *Id.* at 1a-2a.

As a result of SSgt. Witt's death, petitioner received $250,000 in benefits from his military life insurance policy. No. 2:08-cv-02024, Docket entry No. 8-2, at 6 (E.D. Cal. Nov. 3, 2008). Under the Veterans Benefits Act (VBA), 38 U.S.C. 1110, petitioner also is currently receiving $1154 per month tax-free, payable for life unless she remarries before age 57. See 38 U.S.C. 1311(a)(1) (Supp. 2009). SSgt. Witt's two children are each receiving an additional $286 per month tax-free under the VBA, payable until they become 18 years old. See 38 U.S.C. 1311(b) (Supp. 2009).

Petitioner also received a statutory death payment of $100,000 under the Death Benefit Enhancements of the National Defense Authorization Act for Fiscal Year 2006, Public Law No. 109-163, 119 Stat. 3316, Sec. 664. In addition, petitioner and her children are also eligible for medical care under the TRICARE military program, with the same health plan options that they had before SSgt. Witt's death. See 10 U.S.C. 1071-1110 (2006 & Supp. 2009). They also are entitled to receive Dependent Education Assistance of $925 per month for up to 45 months for full time attendance at a qualifying college or university. See 10 U.S.C. 2141-2149.

ARGUMENT

Petitioner argues (Pet. 6-33) that this Court should overrule *Feres* v. *United States*, 340 U.S. 135 (1950), or declare it inapplicable to medical malpractice claims. Two of the three cases consolidated for review in *Feres* involved malpractice claims, however, *id.* at 137, and the Court specifically reaffirmed *Feres* in *Johnson* v. *United States*, 481 U.S. 681, 686 (1987). Since that time, Congress has rejected numerous bills that would have overruled *Feres* or made it inapplicable to medical malpractice cases. And petitioner's contentions that *Feres* has proved unworkable are unfounded. For these and other reasons explained below, overruling *Feres* would violate principles of *stare decisis*. In any event, *Feres* correctly held that the FTCA, 28 U.S.C. 1346(b), 2671-2680 *et seq.*, does not waive the sovereign immunity of the United States for suits on behalf of military personnel based on service-related injuries. The courts of appeals agree that suits seeking recovery for medical malpractice suffered by service members on active duty fall in that category. The Court should therefore deny the petition for a writ of certiorari.

1. "[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (citation omitted). *Stare decisis* "ensures that the 'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.'" *Ibid.* (citation omitted). Thus, any decision to overrule precedent "demands special justification." *Ibid.* (citation omitted). Moreover, *stare decisis* has "special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legisla-

tive power is implicated, and Congress remains free to alter what [the Court has] done." *Id.* at 172-173. Accordingly, "the burden borne by the party advocating the abandonment of an established precedent is [even] greater where the Court is asked to overrule a point of statutory construction." *Id.* at 172. Petitioner cannot carry that heavy burden.

Petitioner's arguments about whether *Feres* was correctly decided "were examined and discussed with great care" in *Johnson*. *Patterson*, 491 U.S. at 171. In *Johnson*, the Court noted that Congress had not acted to modify *Feres* "in the close to 40 years since it was articulated, even though, as the Court had noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.'" 481 U.S. at 686 (citation omitted). As the Court explained, the Court "ha[d] never deviated" from *Feres*'s holding that service members may not sue the United States for injuries 'that arise out of or are in the course of activity incident to service.'" *Ibid.* (quoting *Feres*, 340 U.S. at 146). The Court thus "decline[d] to modify the doctrine at [that] late date," *id.* at 688, almost 25 years ago. For the Court to reconsider *Feres* now, based on the same arguments rejected in *Johnson*, would particularly disserve the goal of maintaining a stable judicial system. Only confusion and instability would occur if the Court overruled a "well established" precedent like Feres. See *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 670 (1977); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008).

Moreover, in the almost 25 years since this Court reaffirmed *Feres* in *Johnson*, Congress has rejected numerous bills that would have limited *Feres*, including by

rendering it inapplicable to medical malpractice claims.[1] Congress's long acquiescence in *Feres* was one of the principal reasons why the Court reaffirmed *Feres* in *Johnson*. See 481 U.S. at 686. Congress's repeated refusal to modify *Feres* since *Johnson* provides even more compelling reasons for not disturbing *Feres*, and further evidence that *Feres* represents a correct interpretation of the FTCA. See *John R. Sand & Gravel Co.*, 552 U.S.

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[1] See H.R. 1478, 111th Cong., 1st Sess. (2009); S. 1374, 111th Cong., 1st Sess (2009); H.R. 6093, 110th Cong., 2d Sess. (2008); H.R. 4603, 109th Cong., 1st Sess. (2005) (proposed addition of Section 2161(c)(1)(E) to the Public Health Service Act, 42 U.S.C. 300aa-1 *et seq.*); H.R. 2684, 107th Cong., 1st Sess. (2001); H.R. 3407, 102d Cong., 1st Sess. (1991); H.R. 536, 101st Cong., 1st Sess. (1989); S. 2490, 100th Cong., 2d Sess. (1988); S. 347, 100th Cong., 1st Sess. (1987); H.R. 1341, 100th Cong., 1st Sess. (1987); H.R. 1054, 100th Cong., 1st Sess. (1987). Congress held extensive hearings on several of those bills. See *Carmelo Rodriquez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009); *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong., 2d Sess. (2002); *Claims for Negligent Medical Care Provided Members of the Armed Forces: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Medical Malpractice Suits for Armed Services Personnel: Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Compensation for Victims of Military Malpractice: Hearing Before the Military Personnel and Compensation Comm. of the H. Comm. on Armed Services*, 100th Cong., 1st Sess. (1987); *Military Medical Malpractice and Liability for Injuries Resulting From the Atomic Weapons Testing Program: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987).

at 139; *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).[2]

Although overruling a decision may be warranted if it has proven "unworkable" or "inconsistent with the sense of justice or with the social welfare," *Patterson*, 491 U.S. at 173-174 (citation omitted), because the Court declined to overrule *Feres* almost 25 years ago in *Johnson*, it would take a particularly compelling showing of such flaws for the Court to overrule it now. In fact, *Feres* suffers from no such flaws. On the contrary, it provides a straightforward rule of decision that courts have been able to apply with relative ease. See *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (noting that *Feres*'s incident-to-service test "provides a line that is relatively clear" and avoids undue intrusion into the military mission). For that reason, this Court in *Stanley* adopted the *Feres* test as the applicable rule of law for determining *Bivens* liability in suits by service members against other service members. See *ibid.* Only a handful of *Feres* cases have made their way to this Court in the 60-plus years since *Feres* was decided, and those

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[2] Congress has also enacted legislation based on the understanding that *Feres* governs tort claims by military personnel. In 1981, Congress enacted Pub. L. No. 97-124, 95 Stat. 1666, which amended the tort claims provisions of the United States Code "to provide the National Guard the same coverage under the Torts Claims Act as now exists for the Armed Forces." H.R. Rep. No. 384, 97th Cong., 1st Sess., Pt. 1, at 2 (1981). The House Report accompanying the legislation stated that "[i]t is well settled that claims for injuries to servicemen that 'arise out of or are in the course of activity incident to service' may not be brought under the" FTCA pursuant to *Feres*, and that "[i]t is the intent of the Committee that the rule of the *Feres* case apply to the acts or omissions of National Guard personnel." *Id.* at 5.

cases represent nothing more than the fine-tuning any legal doctrine can require from time to time.[3]

The *Feres* doctrine is particularly well-settled in the context involved here—medical malpractice actions on behalf of active-duty service members. The courts of appeals all recognize that such claims are barred. See, *e.g.*, *Borden* v. *Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994); *Matthew* v. *United States*, 311 Fed. Appx. 409 (2d Cir.), cert. denied, 130 S. Ct. 101 (2009); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 26 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Molnar* v. *United States*, 210 F.3d 372 (6th Cir.), cert. denied, 531 U.S. 956 (2000); *Jones* v. *United States*, 112 F.3d 299 (7th Cir.), cert. denied, 522 U.S. 865 (1997); *Sloan* v. *United States*, 208 F.3d 218

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[3] In *United States* v. *Brown*, 348 U.S. 110 (1954), the Court held that *Feres* does not bar FTCA claims by discharged service members if the claims arise out of activity that occurred after discharge. In *United States* v. *Shearer*, 473 U.S. 52 (1985), the Court held that *Feres* bars FTCA claims based on injuries inflicted by other service members, because such suits would require the courts to second-guess core military judgments regarding the supervision and control of military personnel. In *Johnson*, *supra*, the Court held that *Feres* bars FTCA claims on behalf of service members even for injuries caused by civilian government employees. The Court's remaining *Feres* cases have concerned whether the "incident to service" test should be extended to other contexts besides FTCA suits on behalf of service members. See *Stanley*, *supra* (the "incident to service" test governs whether service members may bring *Bivens* claims); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero Eng'g Corp.*, *supra* (*Feres* bars indemnification action against United States for damages paid by third party to service member who was injured in the course of military service); *United States* v. *Munoz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

(8th Cir. 2000); *Carter* v. *United States*, 182 F.3d 924 (9th Cir.), cert. denied, 528 U.S. 931 (1999); *Forgette* v. *United States*, 35 F.3d 574 (10th Cir. 1994), cert. denied, 513 U.S. 1113 (1995); *Jimenez* v. *United States*, 158 F.3d 1228 (11th Cir. 1998); *Antoine* v. *United States*, 990 F.2d 1377 (D.C. Cir. 1993); *Mackie* v. *United States*, 172 Ct. Cl. 393 (Ct. Cl. 1965). That is no surprise, given that two of the three cases consolidated for review in *Feres* itself were medical malpractice cases. See *Feres*, 340 U.S. at 137.[4]

A decision may also be overruled when it is incompatible with the law as it has developed in other areas. See *Patterson*, 491 U.S. at 173-174. But that is far from the situation with *Feres*. On the contrary, *Feres* has been woven into the fabric of the law in a number of different contexts. For example, as noted above, the Court has adopted *Feres's* "incident to service" test as the governing rule for *Bivens* claims brought by one service member against another. See *Stanley*, 483 U.S. at 684. The Court has also adopted the *Feres* test to govern when an indemnification action may be brought against the United States for damages paid by third parties to service members. See *Stencel Aero Eng'g Corp.*, *supra*. Similarly, lower courts have held that the *Feres* test

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[4] Because the law is so well settled, most FTCA suits on behalf of active-duty service members alleging military medical malpractice concede that *Feres* bars the claims and are filed in anticipation of challenging *Feres* in this Court. Those cases typically produce unpublished per curiam or memorandum opinions from the courts of appeals and a subsequent denial of certiorari. See, *e.g.*, *Zmysly* v. *United States*, 130 S. Ct. 3324 (2010) (No. 09-1108); *Hafterson* v. *United States*, 130 S. Ct. 416 (2009) (No. 09-240); *Matthew* v. *Department of Army*, 130 S. Ct. 101 (2009) (No. 08-1451); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985).

governs whether the United States may be sued in tort for the death or injury of a foreign service member. See, *e.g.*, *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978). See also *Backman* v. *United States*, 153 F.3d 726 (10th Cir. 1998) (*Feres* test applies to tort actions brought by commissioned officers of the Public Health Service); *Scheppan* v. *United States*, 810 F.2d 461 (4th Cir. 1987) (same). This Court should therefore be particularly hesitant to overrule *Feres*, because doing so would unsettle the law in a number of areas. See *California* v. *FERC*, 495 U.S. 490, 499 (1990) (declining to overrule a precedent because the Court had "employed" it "with approval in a range of decisions" in the same and "other contexts").

2. a. In support of her argument that *Feres* should be overruled, petitioner contends (Pet. 7-11) that the courts of appeals apply inconsistent legal tests in determining whether a suit is barred. That contention is incorrect. All of the circuits recognize that, as *Feres* itself held, the fundamental inquiry is whether the service member's injury arose out of activity "incident to service." 340 U.S. at 146. The circuits also uniformly understand, as this Court made clear in *United States* v. *Shearer*, 473 U.S. 52 (1985), that the inquiry "cannot be reduced to a few bright-line rules," but instead requires analysis of the facts and circumstances of "each case," "examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *Id.* at 57.

All of the courts of appeals follow the fact-specific approach described in *Shearer*. See *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir.), cert. denied, 534 U.S. 1078 (2002); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Fleming* v. *USPS, Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards*

v. *United States*, 176 F.3d 652, 655 (3d Cir.), cert. denied, 528 U.S. 1136 (1999); *Whitley* v. *United States*, 170 F.3d 1061, 1070-1075 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Schoemer*, 59 F.3d at 28; *Stephenson* v. *Stone*, 21 F.3d 159, 162-163 (7th Cir. 1994); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); *Brown* v. *United States*, 739 F.2d 362, 367-368 (8th Cir.), cert. denied, 473 U.S. 904 (1984). The most frequently recurring considerations include the service member's duty status at the time he or she was injured, see, *e.g.*, *Stewart*, 90 F.3d at 104; *Schoemer*, 59 F.3d at 29; *Brown*, 739 F.2d at 367; the location of the tort, see, *e.g.*, *Whitley*, 170 F.3d at 1070; *Day*, 167 F.3d at 182; the activity in which the service member was involved, see, *e.g.*, *Fleming*, 186 F.3d at 700; *Richards*, 176 F.3d at 656; *Wake*, 89 F.3d at 61; whether the service member's conduct was subject to military regulations, see, *e.g.*, *Pringle*, 208 F.3d at 1226; *Stephenson*, 21 F.3d at 163; and whether the service member's activity arose out of military life or was a benefit of military service, see, *e.g.*, *Costo*, 248 F.3d at 868; *Verma*, 19 F.3d at 648.

Petitioner incorrectly argues (Pet. 7-8, 10) that some circuits have developed their own, inconsistent multifactor tests for determining whether an injury is service-related. Although some circuits (such as the First, Fifth, Ninth, and Eleventh) have identified specific factors that courts should consider, those circuits all also require consideration of the "totality of the circumstances," *Costo*, 248 F.3d at 867, recognizing that "[n]o single element * * * is decisive," *Day*, 167 F.3d

at 682; accord *Whitley*, 170 F.3d at 1075; *Schoemer*, 59 F.3d at 28.

Petitioner also contends (Pet. 8-10) that the courts of appeals are confused about whether or to what extent the rationales that support the *Feres* doctrine enter into the analysis. No confusion exists. In *Johnson* and *Stanley*, this Court made clear that a suit is barred whenever the injury arose out of activity incident to service, regardless of whether precluding the particular suit would further the *Feres* rationales. See *Johnson*, 481 U.S. at 686-688; *Stanley*, 483 U.S. at 682-683. Consistent with those cases, the courts of appeals consider the *Feres* rationales only as additional support for a determination whether an injury is service-related or in deciding whether *Feres* extends beyond the traditional paradigm of suits on behalf of service members for service-related injuries. Thus, contrary to petitioner's assertion that the Ninth and Tenth Circuits "ignore the rationales" (Pet. 9), those courts invoke the rationales to buttress their conclusions that injuries are service-related. See, *e.g.*, *Pringle*, 208 F.3d at 1227; *Stephenson*, 21 F.3d at 163-164. Also contrary to petitioner's contention (Pet. 8-9), the Fourth and Sixth Circuits consider the rationales for the same purposes. Thus, in *Romero by Romero* v. *United States*, 954 F.2d 223, 226 (4th Cir. 1992), and *Brown* v. *United States*, 462 F.3d 609, 613 (6th Cir. 2006), those courts considered the rationales in deciding whether *Feres* extends to claims brought on behalf of the *children* of service members (rather than service members themselves). In cases involving the traditional *Feres* paradigm, those circuits have made clear that the critical inquiry is whether the injury arose out of "activity incident to military service," *Fleming*, 186 F.3d at 699, and that resolution of that inquiry turns

on all the "circumstances of th[e] case," *Stewart*, 90 F.3d at 104.

b. Petitioner further contends (Pet. 11-18) that the courts of appeals have reached conflicting results when applying *Feres* in a few contexts far afield from this case. Even if that were true, it would signal only that this Court's review was needed to resolve the conflicts; it would not justify overruling *Feres*, particularly in this case, which involves a context in which application of the doctrine is well settled. In any event, the purported circuit conflicts identified by petitioner do not exist.

For example, the prenatal care cases that petitioner cites (Pet. 11-12) are not inconsistent with one another. Courts of appeals have held that FTCA claims on behalf of a service member's child are barred when the claims are derivative of the parent's injury or treatment. See *Irvin* v. *United States*, 845 F.2d 126, 131 (6th Cir.), cert. denied, 488 U.S. 975 (1988)); *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Claims on behalf of the child are not barred, however, when the injury to the child resulted from independent negligence in treatment directed towards the health of the child alone. See *Brown*, 462 F.3d at 614-615 (distinguishing *Irvin*); *Romero by Romero*, 954 F.2d at 225, 226 (distinguishing *Irvin* and *Scales*); *Del Rio* v. *United States*, 833 F.2d 282, 286-287 (11th Cir. 1987) (rejecting claim that children's injury was derived from mother's injury); see also *Mossow* v. *United States*, 987 F.2d 1365, 1369 (8th Cir. 1993) (applying same rule to legal malpractice claim on behalf of child).

Petitioner is also incorrect in asserting (Pet. 14-15) that a conflict exists among decisions addressing injuries arising out of recreational activities. In *Kelly* v. *Panama Canal Commission*, 26 F.3d 597 (1994), the

Fifth Circuit held that *Feres* did not bar an FTCA claim brought by the survivors of a service member who was killed while engaged in a recreational sailing trip. The key facts were that the service member "was sailing a privately owned catamaran, and no special military rules or regulations applied to govern the conditions of his sailing." *Id.* at 600. Likewise, in *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008), *Feres* did not bar the suit because the injured service member was a mere guest on a boat that another service member had rented from a military recreational facility. See *id.* at 640. The injured service member's presence served no military function, *ibid.*, and guests did not need to be service members, so the service member's "relationship to the Army was coincidental to his injuries," *id.* at 643. In *Costo*, *supra*, and *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986), in contrast, *Feres* barred the suits because the service members were injured while taking advantage, in their military capacities, of recreational activities that were under military control. *See Costo*, 248 F.3d at 867 (noting that the military rafting trip in question was provided to the deceased service member "as a benefit of military service" and that the program "was under the command of the base's commanding officer"); *Bon*, 802 F.2d at 1095 (noting that the injured service member "enjoyed the use of the Special Services Center solely by virtue of her status as a member of the military," and that the Center "was directly under the control of the commanding officer of the San Diego Naval Training Center").

Also, contrary to petitioner's assertion (Pet. 15-16), *O'Neill* v. *United States*, 140 F.3d 564 (3d Cir.) (Becker, C.J., statement sur denial of petition for rehearing en banc), cert. denied, 525 U.S. 962 (1998), and *Pringle*,

supra, do not conflict with *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Durant* v. *Neneman*, 884 F.2d 1350 (10th Cir. 1989), cert. denied, 493 U.S. 1024 (1990); and *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984). In *O'Neill*, *Feres* barred an FTCA suit arising out of a service member's death because the deceased was killed in her military quarters by another service member whom the military had allegedly failed to supervise properly. See 140 F.3d at 565 n.**; U.S. Brief, *O'Neil*, No. 97-7030 (3d Cir.), 1997 WL 33710271, at *3. Similarly, in *Pringle*, *Feres* barred the suit because the service member's injuries resulted from the government's allegedly negligent failure to provide adequate protection at a military club that was located on base, provided for the benefit of service members, and under the operational control of the base commander. 208 F.3d at 1222, 1226-1227. By contrast, the claims that the courts permitted to go forward in *Lutz*, *Durant*, and *Brown*, did not allege negligent supervision of military personnel or negligent operation of a government program. Indeed, the claims were not even against the government, but were instead against other service members. See *Lutz*, 944 F.2d at 1479-1480; *Durant*, 884 F.2d at 1351-1352; *Brown*, 739 F.2d at 363-364.[5]

Petitioner likewise fails to identify (Br. 17-18) any conflict between *Richards*, *supra*, and *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980), or *Schoenfeld* v. *Quamme*, 492 F.3d 1016 (9th Cir. 2007). In *Richards*, *Feres* barred an FTCA suit where a service member was killed in an on-base collision with a military truck while leaving his duty station at the end of his work day. The

[5] The court in *Brown* held that the claim against the United States for negligent supervision of the service members who injured Brown was barred under *Feres*. 739 F.2d at 364.

key fact, the Third Circuit held, was that the decedent was present at the location of the accident because of his military status and not merely "as a member of the general public." 176 F.3d at 656. By contrast, in *Schoenfeld*, *Feres* was inapplicable because the injured service member was on liberty and was not present on the road where the accident occurred because of his military status. See 492 F.3d at 1024-1025. Similarly, in *Parker*, *Feres* was inapplicable because the injured service member was on a four to five day pass when his vehicle was hit, see 611 F.2d at 1014, and his connection with the military when injured was thus much more attenuated than that of the service member in *Richards*, who was not on a pass or furlough, see 176 F.3d at 654.

3. Even if principles of *stare decisis* did not preclude reevaluation of *Feres*, the decision should not be overruled because it was correctly decided. Contrary to petitioner's contentions (Pet. 24-28), the reasons the Court identified in *Johnson* for why *Feres* is a valid interpretation of the FTCA, see 481 U.S. at 688-691, remain sound.

First, because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Johnson*, 481 U.S. at 689 (citation and internal quotation marks omitted; brackets in original). As the Court explained in *Feres*, "[S]tates have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence." 340 U.S. at 143. As a result, "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over

which they have no control and to laws which fluctuate in existence and value." *Ibid.* Moreover, allowing disparate recovery based on the fortuity of where each service member's injury occurred could undermine the trust and goodwill among service members that is essential to military success. To allow service members who are injured in the United States to bring FTCA actions, while service members injured in combat overseas are barred from such recovery, see 28 U.S.C. 2680(j), would severely test that trust and goodwill, and potentially create serious morale problems in the military.

Second, as the Court noted in *Johnson*, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift [and] efficient, normally requir[ing] no litigation." 481 U.S. at 690 (citation and internal quotation marks omitted; brackets in original). It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.* As the Court explained in *Feres*, if Congress had intended the FTCA to provide a statutory tort remedy for injuries to service members that arise from service-related activity, "it is difficult to see why [Congress] should have omitted any provision to adjust these two types of remedy to each another." 340 U.S. at 144. "The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Ibid.*

Third, "suits brought by service members against the Government for [service-related] injuries * * * are barred by the *Feres* doctrine because they are the

'*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 690 (citation omitted). "Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691 (footnote omitted).

The *Johnson* dissenters did not dispute "the possibility that some suits brought by servicemen will adversely affect military discipline." 481 U.S. at 699. They considered that point insufficient to support *Feres* because *Feres* does not bar courts from reviewing military decisions in FTCA suits by civilians. See *id.* at 700. As the Court noted in *Johnson*, however, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and one's country." *Id.* at 691. As a result, "[s]uits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." *Ibid.* That concern is not implicated by FTCA suits based on injuries to civilians.[6]

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[6] Petitioner argues (Pet. 27) that the existence of habeas review of court-martial proceedings and the ability of service members to seek injunctive or declaratory relief for constitutional violations in certain circumstances shows that federal court review is not destructive of military discipline. That argument overlooks that habeas review of court-martial proceedings is limited to determining "whether the military have given fair consideration" to the service member's claims, and federal courts may not reexamine the merits of the claims. *Burns* v. *Wilson*, 346 U.S. 137, 144 (1953) (citation omitted). Similarly, courts give substantial deference to military judgments in adjudicating consti-

Petitioner also mistakenly argues (Pet. 23-24) that *Feres*'s interpretation of the FTCA lacks support in the statute's language. As the Court explained in *Feres*, the FTCA states that the United States shall be liable under the Act "in the same manner and to the same extent as a private individual under like circumstances." 340 U.S. at 141 (citing 28 U.S.C. 2674(a)). There is "no liability of a 'private individual' even remotely analogous" to a claim by or on behalf of a service member who is injured as a result of service-related activity. *Ibid.*[7]

Petitioner contends (Pet. 23-24) that the FTCA should not be read to exclude from its waiver of sovereign immunity service-related claims on behalf of service members because the statute contains other provisions (28 U.S.C. 2680(a), (j) and (k)) that also exempt some claims by service members. That argument is not persuasive. Numerous FTCA exclusions overlap with one another, including the very exclusions on which petitioner relies. Section 2680(j)'s exemptions for claims arising out of combatant activities during time of war overlaps with Section 2680(k)'s exemption for claims arising in a foreign country, and both of those exemptions in turn overlap with Section 2680(a), the discre-

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tutional and civil rights actions by service members for injunctive or declaratory relief. See, *e.g.*, *Winter* v. *NRDC*, 555 U.S. 7 (2008); *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

[7] Petitioner wrongly asserts that the Court in *Feres* "acknowledged the lack of textual support for" its holding. Pet. 24. Petitioner bases that contention on *Feres*'s statement that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. That statement is not an acknowledgment of a lack of textual support, but a clear indication that the Court believed that the rule it adopted was consistent with the FTCA's text.

tionary function exception. Similarly, the discretionary function exemption overlaps with the exemptions for claims arising from the imposition of a quarantine, 28 U.S.C. 2680(f), and regulation of the monetary system, 28 U.S.C. 2680(i). Thus, overlap among the different exemptions is no reason to read any of them out of the statute.

4. Petitioner also errs in arguing (Pet. 18-22) that criticisms of *Feres* raised by some lower court judges justify overruling the decision. Petitioner first invokes (Pet. 18-20) the contentions of some judges that *Feres*'s interpretation of the FTCA lacks a textual basis and is not justified by the policy rationales explicated by this Court. As discussed above, those criticisms are unfounded. See pp. 16-20, *supra*. And, even if the criticisms were valid, they would at most suggest that *Feres* was incorrectly decided, which would not be a sufficient justification for overruling it, particularly since its interpretation of the FTCA has been in place for more than 60 years.

Petitioner also relies (Pet. 20) on the criticism that lower courts have extended *Feres* to circumstances beyond those contemplated by this Court. Even if that criticism were valid, it would not justify overruling *Feres*; instead, at most it would suggest that the Court might consider whether to address any asserted overextension of the doctrine by making clear its proper scope. Moreover, that criticism has no relevance to this case. Application of *Feres* to medical malpractice suits is well within the scope contemplated by this Court, since, as discussed above, two of the decisions involved in *Feres* itself involved malpractice claims. See p. 9, *supra*.

Finally, the purported inequities of barring tort recoveries by military personnel for service-related injuries (Pet. 20-21) do not justify overruling *Feres*. Such policy issues are the concern of Congress rather than the courts, and Congress has for 60 years declined to overturn or limit *Feres*, despite numerous opportunities to do so. See pp. 5-6 & note 1, *supra*.[8]

5. Finally, petitioner argues (Pet. 31-32) that this case would be an "excellent opportunity" (Pet. 31) for reconsidering *Feres* because she asserts SSgt. Witt was on leave when the alleged medical malpractice occurred. SSgt. Witt was, however, on active duty and engaged in the process of moving his family to California pursuant to military orders. See No. 2:08-cv-02024, Docket entry No. 12-1, ¶ 2. In any event, the courts of appeals have held that *Feres* bars FTCA medical malpractice claims even if the injured service member was on leave when the alleged malpractice occurred. See, *e.g.*, *Jimenez*, 158 F.3d at 1229; *Appelhans*, 877 F.2d at 311-312; *Lampitt* v. *United States*, 753 F.2d 702, 703 (8th Cir.) (per curiam), cert. denied, 472 U.S. 1029 (1985); *Jones* v. *United States*, 729 F.2d 326, 328-329 (5th Cir. 1984). Although petitioner suggests (Pet. 32) that a circuit conflict exists on whether *Feres* bars claims arising from malpractice occurring while a service member is on leave, the cases that petitioner cites actually concern "medical hold," a process used to retain service members beyond their previously established retirement or

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[8] Petitioner also contends (Pet. 29-30) that the frequency of *Feres* cases in the lower courts demonstrates a lack of clarity that warrants this Court's intervention. The petition, however, fails to show that *Feres* cases actually arise with unusual frequency, and resolution of medical malpractice suits such as this one requires the expenditure of only limited judicial resources. See pp. 8-9 & note 4, *supra*.

separation date for disability processing. See *Harvey* v. *United States*, 884 F.2d 857, 861 (5th Cir. 1989); *Madsen* v. *United States ex. rel. U.S. Army Corps of Eng'rs*, 841 F.2d 1011, 1012 (10th Cir. 1987). Any conflict between *Harvey* and *Madsen* is not implicated by this case, because SSgt. Witt was never on medical hold.[9]

Petitioner also argues (Pet. 31-32) that this case would be a good vehicle to reconsider *Feres* because medical malpractice claims purportedly do not require second-guessing of military judgments and thus do not implicate the rationales underlying *Feres*. As various courts of appeals have explained, however, the *Feres* rationales apply to medical malpractice claims by service members for several reasons. First, free medical care by the military is a benefit of military service and thus triggers the "distinctively federal" relationship between a soldier and the military. See, *e.g.*, *Del Rio*, 833 F.2d at 286; *Shults* v. *United States*, 421 F.2d 170, 171 (5th Cir. 1969); cf. *Costo*, 248 F.3d at 868 (applying same rationale to non-medical malpractice claims involving a benefit of service).[10] Medical malpractice suits by active-duty service members also could substantially disrupt the military mission, by requiring officers who may have since been assigned to serve in remote loca-

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[9] *Harvey* also suggests that a service member would also be able to sue for medical malpractice that occurred while he was on TDRL. 884 F.2d at 860. That issue also is not implicated by this case, because SSgt. Witt was not placed on TDRL until October 11, 2003, the day after the alleged malpractice occurred. See p. 2, *supra*.

[10] Free medical care is not only a benefit to the service member but also essential to maintaining a strong combat force. Maintaining medical readiness is as vital a command concern and as critical to military success as training, equipping, and deploying service members and planning logistics and combat.

tions to testify in court as to their decisions and actions, see *Del Rio*, 833 F.2d at 286; cf. *Stanley*, 483 U.S. at 682-683 (noting these concerns), and by requiring the military to reallocate scarce resources away from compelling military needs in order to avoid civil medical malpractice lawsuits for service-related injuries. See *Schoemer*, 59 F.3d at 30; *Bowers* v. *United States*, 904 F.2d 450, 452 (8th Cir. 1990). As noted above, all of the courts of appeals agree that *Feres* bars medical malpractice claims on behalf of active-duty service members. See pp. 8-9, *supra*. That consensus makes this case a particularly inappropriate vehicle for reexamining *Feres*'s scope.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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